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No. 06-1228

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IN THE

Supreme Court of the United States

MBNA AMERICA BANK, N.A.,
Petitioner,

v.

TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a State's business franchise and corporate net income tax—properly apportioned, non-discriminatory, and fairly related to the State's services—may satisfy the threshold "nexus" requirement under the Commerce Clause based on a corporation's substantial economic nexus with the State, even if there is no in-State "physical presence."

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

For the time period in question, MBNA's principal business was issuing and servicing VISA and Mastercard credit cards for individuals throughout the United States.[1] MBNA marketed and continues to market its credit cards to numerous West Virginia residents on a regular basis. During tax year 1998, MBNA earned $8,419,431.00 from interest income, service charges, fees, and other receipts from credit cards attributable to individuals with West Virginia addresses. In 1999, its West Virginia earnings increased to $10,163,788.00. Pet. App. 3a.

[1] After the tax years in question, MBNA Corporation was acquired by Bank of America Corporation. *See* Pet. 5 n.2.

MBNA filed annual returns in West Virginia and paid $32,010.00 in Business Franchise Tax and $168,034.00 in Corporation Net Income Tax for the 1998 tax year; in 1999, it filed annual returns and paid Business Franchise Tax in the amount of $42,339.00 and Corporation Net Income Tax in the amount of $220,897.00. Pet. App. 3a.[2] MBNA then claimed that West Virginia lacked jurisdiction to tax it and sought refunds. The refund claims were denied by the Tax Commissioner and were litigated at the Office of Tax Appeals, where the refunds were granted. The Circuit Court of Kanawha County, West Virginia, reversed the administrative decision and affirmed MBNA's tax liability. On appeal, the Supreme Court of Appeals of West Virginia likewise affirmed the imposition of the taxes, finding that MBNA's significant economic nexus with West Virginia met the relevant Commerce Clause test established in this Court's precedents.

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[2] The franchise tax is measured by a taxpayer's capital, and the net income tax is measured by the taxpayer's net income. *See* West Virginia Code Section 11-23-1 *et seq.* and West Virginia Code Section 11-24-1 *et seq.* MBNA plainly meets West Virginia's statutory requirements for nexus. West Virginia Code § 11-23-5a(d) (1996) provides in relevant part:

> A financial organization that has its commercial domicile in another state is presumed to be regularly engaging in business in this state if during any year it obtains or solicits business with twenty or more persons within this state, or if the sum of the value of its gross receipts attributable to sources in this state equals or exceeds one hundred thousand dollars.

The statutory nexus required for the West Virginia corporation net income tax is found in W. Va. Code § 11-24-7b(d) (1996), which provides in part:

> A financial organization that has its commercial domicile in another state is presumed to be regularly engaging in business in this state if during any year it obtains or solicits business with twenty or more persons within this state, or if the sum of the value of its gross receipts attributable to sources in this state equals or exceeds one hundred thousand dollars.

Because MBNA extends credit to cardholders and does not sell tangible property, its generation of income is dependent on other businesses' brick-and-mortar facilities, including those in West Virginia. An issuer of credit cards such as MBNA makes money in well established ways: collecting fees from cardholders; extending unsecured credit to cardholders and collecting interest on unpaid balances; and earning a small fee (a small cut of the purchase price) on every cardholder purchase, even if the cardholder pays off the balance each month.

To support its revenue generation, MBNA relies on various state services and benefits. For example, because MBNA extends unsecured credit, it relies on access to West Virginia's courts for the ultimate ability to collect debts from cardholders. It relies on all the services the State provides to West Virginia vendors to facilitate the purchases from them that help produce MBNA's fees. West Virginia's consumer protection laws allow MBNA to compete on a level playing field with other lenders, and state banking laws ensure a sound banking system in West Virginia through which cardholders pay their bills.

MBNA initially challenged the imposition of West Virginia taxes by alleging a violation of every prong of the test for Commerce Clause validity set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977): (a) a substantial nexus with the State; (b) fair apportionment; (c) absence of discrimination; and (d) fair relation to the services provided by the State. MBNA lost all of these challenges at the circuit court level. In the Supreme Court of Appeals of West Virginia, MBNA abandoned all of its challenges except for its Commerce Clause nexus argument. Accordingly, it is now settled in this case that the West Virginia taxes satisfy due

process and are properly apportioned, non-discriminatory, and fairly related to the services provided by West Virginia.[3]

The Supreme Court of Appeals of West Virginia had only one issue before it: whether application of West Virginia's business franchise and corporation net income taxes to MBNA, a business stipulated to have no "physical presence" in the State, violates the Commerce Clause of the United States Constitution. Pet. App. 5a. The Court rejected MBNA's argument that the absence of a physical presence renders the income and franchise taxes unconstitutional under the "substantial nexus" standard of *Complete Auto*, concluding that a "significant economic presence" was sufficient for (indeed, a better measure of) the required substantial nexus. Pet. App. 18a. As to MBNA specifically, the Court examined the "'frequency, quantity and systematic nature'" of MBNA's economic contacts with West Virginia (*id.*) and found that MBNA did in fact have substantial nexus with the State, generating millions of dollars in revenue attributable to West Virginia residents. *Id.* at 21a. In determining that MBNA's economic contacts were sufficient to satisfy the Commerce Clause nexus requirement, the Supreme Court of Appeals of West Virginia concluded (*id.* at 11a-18a) that income and franchise taxes are not covered by *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), in which this Court declined to overrule the physical presence requirement for sales and use taxes articulated in *National Bellas Hess, Inc. v. Department of Revenue of State of Ill.*, 386 U.S. 753 (1967). MBNA challenges that ruling in this Court.

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[3] At no time in this case did MBNA raise an issue about the impact of West Virginia's imposition of its income and franchise taxes on foreign commerce. Its attempt to inject this issue into the case now should be disregarded.

ARGUMENT

The petition in this case primarily rests upon two assertions, both of which are incorrect. To begin with, petitioner claims that this Court has recognized a "longstanding rule . . . that states may impose taxes on an out-of-state company only if that company or its representative has a physical presence in the taxing state." Pet. 2. But there is no such general rule. Although the Court retained the *Bellas Hess* "physical presence" requirement for the imposition of sales and use taxes in *Quill*, the Court in *Quill* took pains to note that it had not articulated such a requirement outside that context, that its retention of the requirement in the *Bellas Hess* context was largely a matter of *stare decisis*, and that such a requirement is generally not in keeping with the prevailing approach to other kinds of state taxes. Indeed, the notion that physical presence is the *sine qua non* of state taxing power is directly contrary to general Commerce Clause authority, which rejects rigid formalism in evaluating the legitimacy of state taxes.

The second erroneous assertion in the petition is the claim that "the states are in conflict" over the applicability of a "physical presence" requirement to taxes other than sales or use taxes. Upon examination of the cases cited by the petition, it is apparent that no state Supreme Court has held that physical presence is required for imposition of state franchise or income taxes. Indeed, the best case that petitioner can offer—a Tennessee court of appeals opinion—not only fails to represent the final word of the Tennessee courts, but, in fact, has been undercut by a later decision from the same court. Thus, there is nothing approaching a conflict among the States that would warrant the attention of this Court.

Petitioner also claims that a "physical presence" requirement is necessary to prevent unchecked state and local taxation. These doomsday predictions are belied by the fact that interstate commerce has continued to flourish under modern

Commerce Clause jurisprudence, even in the absence of an overarching "physical presence" requirement. Moreover, if matters should change, Congress can readily intervene to protect the national economic interest, as it has already done on other occasions. And in any event, this issue has not been sufficiently developed in the lower courts for this Court's intervention at this time to be appropriate. Therefore, the petition should be denied.

I. THIS COURT'S PRECEDENTS DO NOT SUPPORT, BUT INSTEAD UNDERMINE, THE PETITION'S ARGUMENT FOR A PHYSICAL PRESENCE REQUIREMENT FOR STATE INCOME AND BUSINESS FRANCHISE TAXES

Although the petition baldly asserts otherwise, no precedent of this Court imposes a "physical presence" requirement for state franchise or income taxes as a precondition for "substantial nexus" under the Commerce Clause. Such a requirement exists in this Court's precedents only when collection of sales and use taxes is at issue. For other taxes, the governing precedent is the flexible *Complete Auto* standard, which does not require a physical presence and should not now be altered to adopt such a requirement for the income and franchise taxes at issue here.

A. *Quill* Is Explicit That The Court's Precedents Do Not Impose a Physical Presence Requirement Beyond Sales and Use Taxes

The Court in *National Bellas Hess* adopted a requirement of a physical presence before a State could impose the duty on an out-of-state marketer to collect a sales or use tax. *Quill* re-examined the issue, noting that formal requirements such as physical presence had, in the interim, more generally been rejected in the Court's Commerce Clause cases, culminating in *Complete Auto*. 504 U.S. at 309-11. The Court in *Quill* concluded however, that there was no sufficient reason to

overturn the *Bellas Hess* requirement in the sales and use tax area, citing *stare decisis* and Congress's ability to change the result. 504 U.S. at 314-18.

Business franchise and income taxes are simply outside the scope of the precedents of this Court—*Bellas Hess* and *Quill*—that impose a physical presence requirement for sales and use taxes. In fact, *Quill* itself specifically notes that such a requirement has *not* been imposed outside the sales and use tax context. Thus, not only is there no language in *Quill* supporting the extension of a physical presence requirement to any tax other than sales and use taxes; but also the Court confirmed that it had applied the physical presence requirement **only** in that area, noting that when it had affirmatively reviewed "other types of taxes [it had not] articulated the same physical-presence requirement." 504 U.S. at 314; *see also id.* at 317 ("in our cases subsequent to *Bellas Hess* and concerning other types of taxes we have not adopted a similar bright-line"). In short, we need not look beyond *Quill* itself to disprove MBNA's assertion that the Supreme Court of Appeals of West Virginia's ruling is contrary to this Court's precedents. And in the nearly fifteen years since *Quill* was decided, the Court has not expanded the physical presence requirement to any tax other than a use tax.[4]

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[4] MBNA quotes (Pet. 11-12) a casebook's general passing statement that "courts traditionally have regarded a corporation's physical presence in a state as necessary to establish jurisdiction to subject that corporation to income taxation in the state." J. Hellerstein & W. Hellerstein, *State and Local Taxation* 386 (8th ed. 2005). Although the statement is supported by reference to the *J.C. Penney* decision of the intermediate appellate court in Tennessee, that decision is of questionable strength, as explained below. Moreover, and in any event, the very next sentence states that now "there is room for debate over the question," *id.*, following which the casebook excerpts one of the state supreme court decisions finding a physical presence unnecessary.

B. Under the Governing Precedent Outside the Sales and Use Tax Setting, Nexus Is Possible Without a Physical Presence

The *stare decisis* consideration that was key to *Quill*'s retention of a physical-presence requirement for sales and use taxes militates against introducing such a requirement for business franchise and income taxes. The *Complete Auto* test is intentionally more flexible and less formalistic—the culmination of the Court's recognition that Commerce Clause tax analysis should focus on "economic effect." 504 U.S. at 310. The Court in *Quill* not only relied on *stare decisis* tied specifically to the sales and use tax setting, but also acknowledged that, but for *Bellas Hess*, "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today," thus confirming that the *Complete Auto* standard does not generally contain such a requirement. 504 U.S. at 311; *see id.* at 314 (Commerce Clause law generally "now favors more flexible balancing analyses"). Justice Scalia, whose concurring opinion was joined by Justices Kennedy and Thomas, relied even more heavily on *stare decisis* in *Quill* (*id.* at 320):

> I also agree that the Commerce Clause holding of *Bellas Hess* should not be overruled. Unlike the Court, however, I would not revisit the merits of that holding, but would adhere to it on the basis of *stare decisis*. *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 204 (1990)(SCALIA, J., concurring in judgment). Congress has the final say over regulation of interstate commerce, and it can change the rule of *Bellas Hess* by simply saying so. We have long recognized that the doctrine of *stare decisis* has "special force" where "Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989). See also *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

For the franchise and income taxes at issue here, then, taxpayers such as MBNA cannot legitimately claim any surprise or violation of settled or reasonable expectations in being subjected to taxation that is fairly apportioned, nondiscriminatory, and fairly related to the services provided by West Virginia. To the contrary, *Complete Auto*'s substantive focus readily supports the taxes here, given MBNA's economic contacts with West Virginia. Plainly stated, MBNA is earning millions of dollars annually from West Virginia by directing its intangible financial business into the State and counting on local business activities and the services the State provides to help make possible MBNA's generation of income.

Without the constraint of a governing precedent like *Bellas Hess* and *Quill*, it does not make sense to transform the *Complete Auto* nexus element to demand physical presence as the *sine qua non* of taxation. Under petitioner's theory, a business employing one person, renting a storefront in West Virginia, and generating $100,000 of revenue, would have physical presence and thus be subject to taxation; indeed, under *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977), the existence of the storefront would allow taxation even of activities of the business that were unrelated to the building. Yet MBNA, which generates millions of dollars of revenue attributable to West Virginia residents who frequent West Virginia businesses, would be immunized from paying income and franchise taxes to West Virginia. This outcome is unreasonable where, as here, it is not compelled by *stare decisis*. It is especially unreasonable for a business in the financial-services arena, where the core of the business involves intangibles. In any event, MBNA's proposal is counter to the substance-focused Commerce Clause jurisprudence of *Complete Auto*, which allows States to insist that businesses pay their way when their revenue generation is dependent upon local businesses' activities as well as the State's services.

Concerns about "undue burden" do not support MBNA's argument for introducing a physical presence requirement in the area of business franchise and income taxes. Such concerns are, simply put, speculative. MBNA has produced no evidence that income and franchise taxation in circumstances such as these will cause a substantial burden. To the contrary, as noted below, MBNA has identified a fair number of statutes authorizing such taxes without physical presence but has pointed to no litigation or practical problems whatsoever arising from these statutes. Moreover, as the Supreme Court of Appeals of West Virginia noted, the compliance burden with regard to income and franchise taxes (filing yearly, with readily available software) is less than the burden of collecting sales and use taxes (with monthly filings). Pet. App. 16a-17a.[5]

A party seeking to reverse direction in this Court's Commerce Clause doctrine, especially to steer the law toward a rigidity long since repudiated, needs more than pure speculation to support such an effort. In this respect, MBNA is in an even less sound position than were those seeking to overrule *Bellas Hess* in *Quill*—who were speculating that *no* undue

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[5] "[A]s a general matter, sales and use taxes must be remitted to the government on a more frequent basis than income and franchise taxes. For example, in West Virginia vendors are charged with the duty of collecting from purchasers the consumer sales and service tax and paying the tax to the Tax Commissioner on a monthly basis. This entails making out and mailing to the Commissioner a return for the preceding month on a prescribed form showing the total gross proceeds of the vendor's business during that time, the gross proceeds of the vendor's business upon which the tax is based, the amount of the tax for which the vendor is liable, and any further information necessary in the computation and collection of the tax which the Commissioner may require. *See* W.Va. Code § 11-15-16 (2003)." Pet. App. 16a-17a. The Court added: "Of course, administrative regulations involved in the payment of any type of tax most likely would not be a concern today due to the common use of computers and the availability of specialized software." *Id.* at 17a n.15.

burden would befall mail-order businesses from suddenly changing the pre-existing rule. The Court demanded more for a departure from precedent, even a precedent that concededly had come to be out of keeping with the general jurisprudence in the area. MBNA cannot rely on speculation of harm to justify departing from the flexible approach of *Complete Auto* that is at the very core of the prevailing approach to Commerce Clause issues.

II. THERE IS NO SETTLED LOWER COURT CONFLICT ON THE ISSUE PRESENTED

There is no conflict among the state courts that warrants this Court's review. The petition recognizes that, since *Quill*, the handful of States whose highest courts have examined whether to extend *Quill*'s holding to other taxes have rejected its extension to franchise and income taxes, looking instead to economic realities in considering the "nexus" requirement of the Commerce Clause. Pet. 15-16. On the other hand, although the petition cites to a few decisions in three States as supposedly creating a conflict on the issue of a "physical presence" requirement for franchise and income taxes, none comes from a State's highest court. Indeed, in only a single case cited by the petition has even an intermediate state appellate court invalidated a State's franchise or income tax for lack of physical presence where that State's taxing authorities timely invoked and demonstrated a significant economic nexus, and subsequent authority from the same intermediate appellate court has cautioned against too strong a reading of the initial decision. Thus, the issue presented in this case is not the subject of a ripe conflict among the relevant lower courts (for state tax cases, state Supreme Courts), which, indeed, have barely begun to address the

issue and so far have produced not even one decision adopting MBNA's position.[6]

The exceptional case is the decision of the Tennessee intermediate appellate court in *J.C. Penney Nat'l Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App.1999). But *J.C. Penney* is not a decision of the Tennessee Supreme Court. And the subsequent intermediate appellate court decision in *America Online, Inc., v. Johnson*, 2002 WL 1751434 (Tenn. Ct. App. 2002), creates more uncertainty regarding how the Tennessee Supreme Court will ultimately resolve the issue. (Although *America OnLine* is unpublished, it has been relied upon in a published decision of the Tennessee intermediate appellate court. *Arco Building Systems, Inc. v. Chumley*, 209 S.W.3d 63, 74 (Tenn. Ct. App. 2006).)

Specifically, in *America OnLine*, the court reviewed a chancellor's conclusion that this Court's nexus decisions, as interpreted by *J.C. Penney*, "had held fast to a bright-line test requiring an out-of-state company to have a 'physical presence' in this state in order to have a substantial nexus with it." *Id.*, at *2. Commenting on the chancellor's misunderstanding of what was required in Tennessee to satisfy nexus, the *America Online* court cautioned against too strong a reading of *J.C. Penney*: "We think, however, [the chancellor's] reading of *J.C. Penney* would simply substitute 'physical presence' for 'nexus' as the first prong of the *Complete Auto Transit* test. As we read the cases, neither court has made

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[6] MBNA creates the misimpression that the Supreme Court of Appeals of West Virginia acknowledged the ripeness of this controversy (*see* Pet. 10), when in fact it did not. The majority opinion acknowledged disagreement with the *J.C. Penney* decision (discussed below) upon which petitioner relied, but nowhere indicated that the issue is ripe for this Court's resolution. *See* Pet. App. 21a. Justice Benjamin, in dissent, apparently misread the majority opinion's acknowledgment of no controlling precedent as an indication of ripeness of the issue for this Court's resolution. *See id.* at 30a.

that suggestion." *America OnLine* at *2 (footnote omitted). The *America Online* court further suggested that *J.C. Penney* may itself have overread this Court's decisions: "Perhaps it would have been more accurate to say that the Supreme Court had rejected state taxes on interstate commerce where no activities had been carried on in the taxing state *on the taxpayer's behalf*." *Id.*[7] *America OnLine* thus further undercuts the petition's attempt to treat *J.C. Penney*, already less than definitive as a mere intermediate appellate court decision, as the last word on the Commerce Clause issue in Tennessee.

The remaining decisions cited by the petition, intermediate appellate court decisions from Michigan and Texas (*see* Pet. 13, 14), do even less than *J.C. Penney* to help petitioner, because they are also distinguishable as precedent. *Gillette Co. v. Dep't of Treas.*, 497 N.W.2d 595 (Mich. App. 1993), did not strike down a tax at all. Rather, it *upheld* application of Michigan's "single business tax" to a taxpayer, citing the facts that Gillette had "a sales staff of at least eighteen full-time sales representatives located in Michigan," had "an ownership interest in promotional and replacement merchandise located in Michigan, leased automobiles for its sales representatives in Michigan, and had substantial sales in Michigan

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[7] The court in *America Online* reversed the chancellor's summary-judgment ruling against taxation, which was predicated on AOL's alleged lack of physical presence in Tennessee, and remanded for further factual development, including examination of AOL's relationship with certain network-services providers and the activities of so-called "remote staff," unpaid persons working from their homes. Discovery regarding the remote staff was not limited to activities relating to the solicitation of business and acceptance of payments in Tennessee, but encompassed any information about the remote staffers' activities on AOL's behalf. In *Arco*, the court, citing *America OnLine*, stressed the breadth of the relevant inquiry for "nexus" in determining what activities are carried out on the taxpayer's behalf. 209 S.W.3d at 74.

generated by the sales staff." *Id.* at 600.[8] *Gillette* thus did not involve a taxpayer lacking "physical presence."

Guardian Industries Corp. v. Dep't of Treas., 499 N.W.2d 349 (Mich. App. 1993), likewise did not strike down a tax—much less do so in the face of a showing by the taxing authority of a substantial economic nexus. Rather, it involved the question whether certain taxpayers with undeniable physical presence in Michigan could *exclude* from Michigan's "single business tax" certain "sales" outside Michigan—seemingly, they sent tangible goods into other States—on the ground that the sales were taxable in other States. *Id.* at 352; *id.* at 353 (taxpayer claimed "sales ... were taxable in other states"). In the unusual posture in which the question arose, it was the taxpayers who were urging that their nexus with other States was *sufficient* for taxation by those States; the State of Michigan was urging that the nexus was *insufficient*; and the actual taxing authorities whose constitutional power (in the abstract) was being discussed—namely, the other States—were not present to define and to justify their jurisdiction. The Michigan court concluded that one taxpayer could not claim the desired exclusion from Michigan's tax, because it had stipulated that its activities in the (non-Michigan) States were limited to bare "solicitation," whereas the other taxpayer might yet claim the desired exclusion, as it might have employees present in other States that would allow such States to impose their taxes on the sales there. *Id.* at 357-58. *Guardian* thus does not strike down a State's franchise or

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[8] In *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), the Court found the presence of independent contractors, as opposed to employees, sufficient to establish the required nexus. No constitutional significance was attached to the legal distinctions between independent contractors and employees. Instead the Court focused on the continuous activities of the independent contractors who were responsible for the flow of goods into the taxing State, resulting in earnings by the taxpayer.

income tax for lack of physical presence despite the taxing State's showing of substantial economic nexus.

Finally, *Rylander v. Bandag Licensing Corp.*, 18 S.W.3d 296 (Tex. App. Austin 2000), involved circumstances that significantly narrow the decision's precedential scope. In particular, in invalidating the application of the franchise tax, the Texas court repeatedly stressed that the State had rested its application of its franchise tax to a taxpayer "solely" on the taxpayer's passive possession of a license to do business in Texas. *Id.* at 298 ("[t]he Comptroller imposed the franchise taxes in issue . . . solely because [taxpayer] held a certificate of authority and was 'authorized to do business in this state'"); *id.* at 299 (the Commerce Clause nexus question "requires a determination of whether [taxpayer's] mere possession of a certificate of authority issued by the Secretary of State—the sole basis for the Comptroller's claim according to the trial judge's unchallenged finding of fact—satisfies the requirement that the tax be 'applied to an activity with a substantial nexus' to Texas"); *id.* at 300 ("the sole 'activity' relied upon by the comptroller is [taxpayer's] passive possession of a license to do business in Texas"); *id.* at 301 (same); *id.* at 302 (same).[9] Despite broader dicta, therefore, *id.* at 300, *Rylander* does not reject the imposition of a franchise (or income) tax where the State bases its tax on a timely invocation and showing of active economic conduct directed at residents of the State, though the taxpayer lacks a "physical presence."

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[9] The Comptroller relied on that basis because it was "Comptroller *policy*" that "the licensing of intangibles, including patents, in Texas did not create franchise tax nexus." *Id.* at 302 (emphasis in original). *See id.* at 298 (same). The court indicated that the taxpayer's "sole activity" of relevance connecting it to Texas was "communication by United States mail and common carriers," without identifying any economic activity (except perhaps its licensing activities, which the Comptroller did not count) was the subject of any such communication. *Id.* at 300.

In the end, MBNA's claim of "conflict" squarely rests on only one intermediate appellate court decision from one State, a decision whose language has been questioned by a subsequent intermediate appellate court decision from the same State. There is thus no ripe lower conflict on the issue presented.

III. THE ABSENCE OF A PHYSICAL PRESENCE RULE FOR STATE FRANCHISE AND INCOME TAXES IS CAUSING NO BURDENS WARRANTING REVIEW

The dearth of decided cases on whether physical presence is required for state franchise or income taxes not only undermines the petition's claim of a ripe conflict among lower courts. It also confirms that there is no burden being imposed on multi-state businesses that justifies review of the issue presented by the petition.

In an effort to compensate for the minimal number of judicial decisions even remotely relevant to the issue presented, the petition points to various state statutes and regulations as adopting an elastic nexus rule for the imposition of taxes. MBNA does not limit its list of enactments to banking and financial institutions like itself.[10] But it has wholly failed to establish the extent to which franchise and income taxes are actually being applied to businesses that lack a "physical presence," making its argument based on a collection of citations at best purely conjectural. In fact, in identifying such taxing authority, MBNA has undercut its own argument that the issue it presents warrants consideration by this Court. MBNA points to no litigation resulting from these statutes and regulations, tending to indicate that the legislation is

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[10] The petition also refers to the Multi-State Tax Commission's model nexus statute. *See* Pet. 18. The petition cites no litigation generated by that model statute, which apparently has been adopted in fewer than a handful of States to date.

workable and not unduly burdensome—and certainly undermining any contrary contention by MBNA. In any event, if any litigation under these enactments exists, it can only be working its way through the lower courts, where records could be developed to allow for full consideration by state courts.

In arguing that the identified States' adoption of an elastic economic nexus standard, especially if joined by other jurisdictions, could burden interstate commerce, MBNA also is largely ignoring the Commerce Clause requirements that any tax be fairly apportioned, non-discriminatory, and fairly related to a State's services. Those requirements themselves address many, perhaps all, of the specters that MBNA conjures in arguing for a physical presence requirement for nexus. Indeed, MBNA now must accept that *it* has no complaint that the West Virginia taxes at issue are anything but fairly apportioned, non-discriminatory, and fairly related to the services it receives. Issues regarding discrimination and multiple taxation are separate and distinct from nexus. MBNA has thus failed to show, even for its own case, that the absence of a physical presence rule for franchise or income taxes is creating any undue burden or other unfairness for taxpayers that have a substantial economic nexus to multiple States but may have a physical presence in only one or a few.

IV. REVIEW OF THE ISSUE IS IN ANY EVENT PREMATURE

Without a true conflict or other demonstrated need for the Court to address this matter, the issue is better left to Congress, which has broad power under the Commerce Clause to decide what state taxes might unduly impair interstate commerce. *See Quill*, 504 U.S. at 318. Indeed, Congress has acted in the area of state income taxes once before, enacting 15 U.S.C. § 381, to establish one particular prohibition on state taxation where it saw the need to do so. (MBNA does

not invoke Section 381 here, presumably because its business does not involve the sale of tangible property.) And in recent years, Congress has considered bills addressing nexus issues, demonstrating lawmakers' cognizance of the issue.[11]

Prudence calls for allowing Congress to handle the issue, at least until there is a truly pressing need for this Court's intervention, which simply does not exist now. Congress can better develop a thorough, comprehensive study of the many empirical matters bearing on the issue. The need for additional hearings and evidence is apparent where, as here, the petition makes a sweeping request for a broad rule of tax exemption at the expense of state governments across the Nation. The ruling sought by MBNA would extend well beyond the credit-card industry to any number of other businesses. Congress is generally in a better position than this Court to study the needs of States and the impact on businesses.

Even aside from Congress's comparative advantage, review of the issue in this case by the Court would be inadvisable. Any assessment of the impact of a physical presence rule as advocated by MBNA would benefit from the Court's consideration of all States' needs for the type of taxes at issue in this case, considering a wide range of industries where physical presence is not necessary for massive income generation from persons and transactions within a particular State's borders. The analysis would profit from a survey of the States' experience with taxpayer compliance with such

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[11] Congressional activity in this area includes the Business Activity Tax Simplification Act, H.R. 3220, 108th Cong., 1st Sess. (2003); Business Activity Tax Simplification Act, H.R. 1956, 109th Cong., 1st Sess. (2005); Innovation and Competitiveness Act, H.R. 4845, 109th Cong., 2d Sess. (2006); and Business Activity Tax Simplification Act, S. 2721, 109th Cong., 2d Sess. (2006); *Business Activity Tax Simplification Act of 2005*, Hearing before the Subcomm. on Commercial and Admin. Law of the House Judiciary Comm. on H.R. 1956, 109th Cong., 1st Sess. (2005).

taxes, which may prove readily manageable if and when implemented. At present, any consideration of the issues would be unavoidably abstract, since no record exists in this case of any such data or analysis. Therefore, review of the issue, if it should be conducted at all, is premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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